IN THE

Supreme Court of the United States

October Term, 1940.

No. —— .

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA, and L. M. REED, as Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Third Circuit, and Brief in Support Thereof.

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TABLE OF CONTENTS OF PETITION.

	Page
QUESTION PRESENTED	1
SUMMARY STATEMENT OF THE MATTER INVOLVED...	2
REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT	4
1. The Decision of the Circuit Court Reversing the District Court Is Upon an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	4
2. The Decision Ignores the Basis of Distribution Prescribed by Section 194 of the National Banking Act and Conflicts With the Principles Laid Down by the Decisions of This Court Interpreting Same	5
3. The Decision Is Contrary to the Ratable Dividend Requirement of the Act Even if the Basis for Dividends Was Properly Determined	6
4. The Decision Is in Conflict With the Decisions of Other Circuit Courts on the Same Matter	7

TABLE OF CASES IN PETITION.

	Page
American Surety Company of New York v. The Bethlehem National Bank of Bethlehem, Pennsylvania, and L. M. Reed, as Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, 116 F. (2d) 75	1
American Surety Company v. DeCarle, 25 F. (2d) 20 (C. C. A. 9th)	7
Fouts v. Maryland Casualty Company, 30 F. (2d) 357, 358 (C. C. A. 4th)	7
Merrill v. National Bank of Jacksonville, 173 U. S. 131	4, 5, 7
U. S. v. Knox, 111 U. S. 785	5

TABLE OF CONTENTS OF BRIEF IN SUPPORT OF PETITION.

	Page
OPINIONS BELOW	9
JURISDICTION	9
FACTS	9
THE LAW	10
SPECIFICATION OF ERROR	10
ARGUMENT	11
A. The Basic Requirement for Distribution of Assets of Insolvent National Banks	11
B. The Relation of Such Requirement to Assignment of Claims of National Bank Depositors After Insolvency	13
C. The Relation of Such Requirement to Subrogation to Claims of National Bank Depositors After Insolvency	14
D. The Uncertain Effects of the Disregard of the Principle of Distribution by the Decision Below	18
CONCLUSION	20

TABLE OF CASES, AUTHORITY AND STATUTE IN BRIEF.

	Page
American Surety Company v. DeCarle, 25 F. (2d) 20 (C. C. A. 9th).	16
Chemical National Bank v. Armstrong, 59 Fed. 372, 380 (C. C. A. 4).	19
City of Oakwood v. Hartford Accident and Indemnity Company, 81 F. (2d) 717 (C. C. A. 6th)	19
Fouts v. Maryland Casualty Company, 30 F. (2d) 357 (C. C. A. 4th).	16
Maryland Casualty Company v. Cox, 104 F. (2d) 354 (C. C. A. 6th).	16, 17
Merrill v. National Bank of Jacksonville, 173 U. S. 131,	11, 12, 13, 14, 15, 16, 17
116 F. (2d) 75	9
33 F. Supp. 722	9
In re Thompson, 300 Fed. 215 (W. D. Pa.)	19
Ticonic National Bank v. Sprague, 303 U. S.	16
U. S. v. Knox, 111 U. S. 784	12
Ward v. First National Bank, etc., 76 F. (2d) 256 (C. C. A. 8th).	16, 17
Vol. XL Col. L. Rev., No. 8, p. 1448 (Dec. 1940)	18
National Banking Act, 12 U. S. C. A. Sec. 194 (R. S. 5236)	10

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

This is a petition for writ of certiorari to the United States Circuit Court of Appeals, Third Circuit, involving a decision by that Court in the case of *American Surety Company of New York v. The Bethlehem National Bank of Bethlehem, Pennsylvania and L. M. Reed, as Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania,* Appellants, reported at 116 F. (2d) 75, wherein the Circuit Court reversed a decision of the District Court for the Eastern District of Pennsylvania, reported in 33 F. Supp. 722.

QUESTION PRESENTED.

The case presents the following question:

1. Did the U. S. Circuit Court of Appeals, in reversing the District Court, err in holding that petitioner as sub-

rogee and assignee of a secured depositor of respondent national bank is entitled to payment only of dividends declared following subrogation and assignment and calculated on the actual payment by petitioner to such depositor, and not to payment of such after-declared dividends upon the entire proved deposit amount or at least to dividends on such actual payment amount equal in aggregate percentum to all dividends declared since date of insolvency?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The facts in the case are not disputed and, from the averments of the complaint (R. 2-7) admitted by stipulation in lieu of answer (R. 11-13) may be summarized as follows:

Petitioner is a New York corporation with its principal offices at New York City. It is engaged in the business of suretyship. Respondents are an insolvent national bank and its receiver (hereinafter called the Bank and the receiver).

The petitioner was surety upon a bond for $125,000 given by the Bank to secure deposits of the Commonwealth of Pennsylvania. As additional security the Bank had pledged with the Commonwealth bonds of $12,000 par value. The Bank closed on March 15, 1933, when the Commonwealth's deposit was $135,000.

The Commonwealth duly filed with the receiver its proof of claim for $135,000. That amount was thereafter paid to it in full as follows: By petitioner, $50,000 on account of petitioner's liability as surety, on October 16, 1933; by the receiver, $54,000 as first dividend of 40 per cent. of its deposit from the estate of the Bank, on March 27, 1934; by proceeds of the Commonwealth's sale of the pledged bonds, $12,411.44 on April 23, 1934; by petitioner, $18,588.56 balance (plus certain interest) in April 1934.

The petitioner thus paid to the Commonwealth $68,588.56, not counting interest.

By writing dated May 10, 1934 and lodged with the received on June 8, 1934 the Commonwealth assigned to the petitioner its filed claim of $135,000 against the Bank. Since that date three further dividends have been declared and paid by the receiver to other creditors, as follows: the second dividend, of 20 per cent., on December 12, 1935; the third, of 10 per cent., on July 16, 1938; and the fourth, of 5 per cent., on February 5, 1940. The petitioner claimed to be entitled to payment of each of them on the basis of $135,000 as the amount of the deposit of the Commonwealth at date of insolvency of the Bank, for which the Commonwealth had proved in the receivership. The receiver refused to pay the petitioner on that basis and never has paid any dividend to the petitioner on any basis. At various dates, and always upon condition that the petitioner acknowledge full payment, the receiver offered to pay the second dividend on the basis of $122,588.56 (deposit minus collateral proceeds) less an asserted overpayment of the Commonwealth on the first dividend, and subsequently offered to pay the same second dividend on the basis of $68,588.56, and to pay the third dividend on the basis of $122,588.56 without deduction. No overture was made by the receiver on any basis as to the fourth dividend (which was distributed to other creditors during the pendency of this suit and incorporated herein by stipulation, R. 21-22).

On September 13, 1939 this suit was brought by the petitioner in the District Court for the Eastern District of Pennsylvania for recovery of dividends on the basis of $135,000 and of interest on the dividends from the respective dates of their payment to other creditors of the Bank. Stipulation in lieu of answer and for determination as on a rule for judgment on the pleadings having been filed, the District Court on March 6, 1940 ruled in favor of the petitioner as to both dividend basis and interest on dividends, and judgment therefor was entered on May 20, 1940. Upon

appeal the Circuit Court of Appeals for the Third Circuit on November 27, 1940 reversed the judgment, held the proper dividend basis to be $68,588.56 only and that the second, third and fourth dividends declared in the insolvency should be paid to petitioner on that sum, held the award of interest on dividends to be proper, and remanded the cause for further proceedings accordingly. The mandate has been stayed in that court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Decision of the Circuit Court Reversing the District Court Is Upon an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

This Court has not as yet passed upon the precise question of what basis should be used in and for distribution to a subrogated surety of dividends from the estate of an insolvent national bank. The question is one strictly of federal law, for this Court held in *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, that the National Banking Act furnishes an exclusive code for the distribution of the assets of an insolvent national bank. The importance of the question rests in the fact that it is of nationwide incidence because invariably it arises in every case of national bank insolvency wherein any creditor has been secured by, and is to any extent made whole through, suretyship. That the question needs to be settled by this Court in the interest of certainty in the law, seems to be clear from the striking vacillation by the Office of the Comptroller of the Currency in this very case: The Comptroller, through the receiver, proposed in December 1935 to pay a dividend to petitioner on the basis of $122,588.56, minus an asserted overpayment on a prior dividend (R. 8). Seven months later, in July, 1936, he proposed to pay the same dividend on the basis of $68,588.56, citing only an *interim*

decision of the Eighth Circuit Court (R. 9, 10). In August, 1939, he proposed to pay another dividend on the straight basis of $122,588.56 (R. 6, Par. 14). In the case of the next dividend he made no proposal at all (R. 21, Par. 1). In this suit he returned to the position that dividends are payable on the sum of $68,588.56 (R. 11, Par. 15). Thus, though the Comptroller is the officer charged by this important Act with the administration of its provisions, he was wholly unable to discover in the present state of the law any constant rule whatever for his disposition of the question involved.

2. The Decision Ignores the Basis of Distribution Prescribed by Section 194 of the National Banking Act and Conflicts With the Principles Laid Down by the Decisions of This Court Interpreting Same.

The Act directs that the Comptroller shall pay ratable dividends from the assets of an insolvent national bank on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction.

This Court held in *U. S. v. Knox*, 111 U. S. 785, that the date of insolvency governs the fact and the amount of claims allowable against the bank. In *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, wherein the secured depositor was claimant, this Court held that to be ratable the dividends must be proportionate; that to be proportionate they must be paid on a uniform rule, that is, on one rule applicable to all alike and therefore manifestly upon the basis of claims against the bank as at the same point of time; that that point of time is the date of insolvency, at which claims take a proportionate vested interest in the assets of the national bank and after which no new debt can be made.

The decision below, on the contrary, holds that dividends should be paid not on the basis of $135,000, which was the claim of the Commonwealth-subrogor at date of insolvency and was by it filed and proved to the satisfaction

of the Comptroller, but on the basis of $68,588.56, a claim which neither existed at date of insolvency as prescribed by this Court nor was ever proved in the receivership so as to be cognizable by the Comptroller as a basis for dividend.

3. The Decision Is Contrary to the Ratable Dividend Requirement of the Act Even if the Basis for Dividends Was Properly Determined.

Even assuming that the $68,588.56 dividend basis fixed upon by the Circuit Court is not in conflict with the Act and its interpretation by this Court in point of principal basis, the decision results in utterly disproportionate distribution in point of dividend per centum. The Court below stated in arriving at the principal basis (R. 30):

> "The surety and the depositors shared the same risk. It seems fair that they should share, in partial compensation for their loss, on the same basis. The basis on which the depositors share is the proportion of their actual loss, the amount of their deposits. The surety's actual loss is the same that it paid out, which was $68,588.56. This, we think, is the basis on which it is entitled to claim."

The Court left completely out of account the coefficient which is absolutely necessary to ratable sharing, namely, the measure or extent of participation on whatever principal basis is selected. As the depositors received a forty per cent dividend on deposits before the petitioner succeeded the Commonwealth, and as the Court's decision awards to petitioner only dividends declared after that date, it seems inescapable under the decision that petitioner, though depositors recover 100% of their losses, could not possibly recover more than 60% of its conceded loss. Without regard, therefore, to the propriety of the dividend basis, the clear outcome under the decision cannot be other than a seriously unratable distribution.

The Act itself in terms requires, on the contrary, ratable distribution which this Court in *Merrill v. National Bank of Jacksonville, supra,* has held to mean distribution on a rule applicable to all alike.

4. The Decision Is in Conflict With the Decisions of Other Circuit Courts on the Same Matter.

The decision is contrary to the decision in *Fouts v. Maryland Casualty Company,* 30 F. (2d) 357, 358 (C. C. A. 4th), wherein the Court stated that "As only one primary debt exists, it follows that the rule of pro rata distribution, in the event of insolvency, requires that such primary debt be the basis of dividends." The court upon that reasoning decided that the surety there claiming should receive, through subrogation to the rights of the secured creditor, all dividends payable on the secured creditor's date-of-insolvency claim over and above the amount added to the surety's payment on the bond, necessary to satisfy his claim. The decision is also in conflict with the principle announced in *American Surety Company v. DeCarle,* 25 F. (2d) 20, that "Under the law, other creditors can claim no benefit from the fact that the Treasurer was secured in whole or in part, and they should not now be permitted to suffer a loss thereby."

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of your Honorable Court directed to the United States Circuit Court of Appeals, Third Circuit, commanding the court to certify and transmit to this Court for review and determination on a date to be therein named, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its docket No. 7518, American Surety Company of New York, Plaintiff-Appellee, v. The Bethlehem National Bank of Bethlehem, Pennsylvania, and L. M. Reed, As Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, Defendants-Appellants; and

that the judgment of said Circuit Court in said case be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to your Honorable Court may seem meet and just, and your petitioner will ever pray.

GEORGE P. WILLIAMS, JR.,
RUTLEDGE SLATTERY,
FRANK P. SLATTERY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania reported in 33 F. Supp. 722, appears at pages 14 to 19 of the printed record. The opinion of the Circuit Court of Appeals, Third Circuit, reported in 116 F. (2d) 75, reversing the decision of the District Court, was entered November 27, 1940, and appears in the printed record at pages 27 to 31.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

FACTS.

Reduced to essentials the facts are simply that at the date of the closing of respondent Bank, the Commonwealth of Pennsylvania had on deposit in it the sum of $135,000, secured by the Bank's bond for $125,000 upon which plaintiff was surety and by $12,000 par value of United States bonds pledged by the Bank. The Commonwealth realized $12,411.44 from sale of the pledged bonds, received from petitioner in several payments a total of $68,588.56, not counting interest, and received from the Bank a liquidating dividend of 40%, or $54,000 upon its proof of claim for $135,000 filed with the Bank's receiver. Having been made whole by these receipts, the Commonwealth assigned its claim to the petitioner. Since then three further dividends have been declared in the liquidation of the Bank and have been paid to other creditors but not to the petitioner.

Petitioner brought this suit, upon theory of subrogation and assignment, for recovery of the after-declared dividends upon the basis of the $135,000 deposit and for recovery also of interest on the dividends from the respective dates of their payment to other creditors. The District Court sustained these positions, save of course only that in no event should petitioner receive in dividends more than the sum of $68,588.56 it had paid to the Commonwealth (R. 17), i. e. that in no event should the Bank through the media of the collateral and dividends pay more than the $135,000 deposit amount. Upon appeal the Circuit Court of Appeals, Third Circuit, while sustaining petitioner's position as to interest on dividends, held that the dividends should be calculated and paid only on the basis of the sum of $68,588.56 paid by petitioner to the Commonwealth (R. 30, 31).

THE LAW.

National Banking Act, 12 U. S. C. A. Sec. 194.

From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividend on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)

SPECIFICATION OF ERROR.

Petitioner makes the following assignment of error which will furnish the basis for the following argument in support of the allowance of the writ.

1. The U. S. Circuit Court of Appeals, in reversing the District Court, erred in holding that petitioner as subrogee and assignee of a secured depositor of respondent national bank is entitled to payment only of dividends declared following subrogation and assignment and calculated on the actual payment by petitioner to such depositor, and not to payment of such after-declared dividends upon the entire proved deposit amount or at least to payment of dividends on such actual payment amount equal in aggregate percentum to all dividends declared since date of insolvency.

This assignment of error involves the following considerations of law, the facts being undisputed:

A. The basic requirement for distribution of assets of insolvent national banks.

B. The relation of such requirement to assignment of claims of national bank depositors after insolvency.

C. The relation of such requirement to subrogation to claims of national bank depositors after insolvency.

D. The uncertain effects of the disregard of the principle of distribution in the decision below.

ARGUMENT.

A. The Basic Requirement for Distribution of Assets of Insolvent National Banks.

The basic requirement for distribution in this case is that it be ratable. That is the requirement in the Act and as a principle it was stated and recognized by the trial court (R. 18) and by the Circuit Court (R. 29, 30) in this case. Both courts noted it as settled by the decision of this Court in *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, that a secured depositor of a closed national bank is entitled to dividends on the basis of the full amount of the deposit, without regard to collections from collateral

held for the debt. Having no decision of this Court on the question of the dividend basis to be employed where, as here, the secured depositor has been made whole and his surety has become entitled to dividends, the District Court below employed the primary debt of the bank, and the Circuit Court below employed the actual payment by the surety, as such basis.

It seems that the first inquiry should be into the *principles* of the law of national bank liquidation upon which the *Merrill* case was decided as it was by this Court, and the question ought then to be whether those principles point the way to disposition of the surety's claim.

In the *Merrill* case this Court, in addition to declaring the National Bank Act to be a full and exclusive code for the distribution of the estate of an insolvent national bank, reasoned that upon the insolvency of such a bank its creditors take and hold a vested interest in its assets in the ratio of their respective claims to the whole debt of the bank, because business must stop upon declaration of insolvency and no new debt can be made after that; that the requirement of ratable dividends means that dividends shall be paid proportionately, that is, on a rule of uniform application and therefore upon the basis of claims as at the same point of time. This Court concluded that the only claims the Comptroller of the Currency can recognize are those shown by proof satisfactory to him or by adjudication to have had their origin in something done before insolvency, and that the value of claims at the date of insolvency is to be taken as the basis of distribution. This last conclusion had been stated by this Court fifteen years before, in *U. S. v. Knox,* 111 U. S. 784.

We submit the limitations of the *Merrill* case principles to be that as a rule of law the Commonwealth deposit in this case in the sum of $135,000 at date of insolvency took at that date a fixed and vested interest in the assets of respondent bank in the ratio it bore at that date to the whole debt of the bank; that nothing done after that date

could upset either that debt structure or the proportionate place of that deposit account within it, and that therefore all dividends declared by the Comptroller until that deposit amount is paid must be paid upon the exclusive basis of it. In the decision below, on the contrary, there was substituted for $135,000 a dividend basis of $68,588.56 growing out of transactions which occurred after the date of insolvency, namely, payments by petitioner to the Commonwealth in an amount not determined by any rule of law of national bank liquidation. In such departure from the principles of the *Merrill* case, we submit, the Court fell into reversible error.

B. The Relation of Such Requirement to Assignment of Claims of National Bank Depositors After Insolvency.

It is a fact in this case, upon which the District Court did not rest its decision (R. 19 (3)), that the Commonwealth assigned its entire proved claim to petitioner. The Circuit Court below referred (R. 29) to the assignment as a "possible makeweight" which did not add anything to the rights petitioner already had. The Circuit Court cited only a Kentucky decision for this view (R. 29), although noting that the question is a federal question (R. 28). The Court also stated (R. 29) that at the time of the assignment the claim had been discharged, which we submit was plain error because it was the duty of the bank under the Act to pay the claim and it simply had not paid it. It is true that the assignment was dated May 10, 1934 (R. 13), following the date of the last payment by petitioner to the Commonwealth (R. 4, Par. 10), but it is admitted that the assignment was made for the value received by the Commonwealth from the petitioner (R. 4, Par. 11). Certainly, it is not for the debtor in any legal situation to profit by dealings between his creditor and another; his obligation is to pay his debt, in this case to pay dividends upon a deposit account of $135,000 existing at date of insolvency. Obviously the claim of any assignor is discharged so far

as the assignor himself is concerned. Moreover, in his letter of December 23, 1935, to petitioner (R. 8) the receiver in terms recognized the Commonwealth's claim of $135,000 as having been assigned to the petitioner in the premises.

We submit it to be inherent in the obligation of the respondent bank to pay dividends on $135,000, as similar obligation was interpreted in the *Merrill* case, that the obligation cannot be reduced by a subsequent assignment but on the contrary that the debtor bank must pay the assignee on the basis of the original deposit. If the secured creditor in the *Merrill* case had assigned his rights for any value the principles of that case seem clearly to prescribe payment of dividends to the assignee on the basis fixed, i. e. of the claim as at date of insolvency. That would be so whether the value paid for the assignment were one dollar or, as here, $68,588.56, because the debtor's burden cannot be changed after date of insolvency.

C. The Relation of Such Requirement to Subrogation to Claims of National Bank Depositors After Insolvency.

The District Court below rested upon subrogation its view that petitioner is entitled to dividends on the basis of $135,000, the Commonwealth's deposit (R. 19 (3)), and stated that to deny this right is in practical effect to deny the right of subrogation. The Circuit Court below rested its reversal of the judgment on the proposition that subrogation will not be allowed to the prejudice of other creditors and its application of that proposition to mean in result that other depositors shall receive here 40% more of their claims than petitioner shall receive of its payment in suretyship.

We submit on the contrary that the petitioner is entitled to subrogation to the primary debt itself, and that by the same token the decision below is in error for two particular reasons affecting the question of subrogation.

In the first place, the cardinal principle of national bank liquidation laid down by this Court in the *Merrill* case

collapses unless the Commonwealth deposit sum of $135,000 is employed as a dividend base until the Bank shall have paid that debt, no matter to whom. This Court having decided in 1898 that liquidation shall be carried out on the basis of debt existing at date of insolvency, consistency and legal certainty seem to command that any and every subsequent event relating to or bearing upon any deposit account must be accommodated to the ratable vested interest that deposit held at date of insolvency. Given the *Merrill* case principle of law, no "equity" could congruously exist or be raised after insolvency in other creditors to effect the discard of that fixed ratio.

In the second place, assuming that an "equity" of other creditors could override the law of the *Merrill* decision, we submit that no such equity exists in the present case. Manifestly the Commonwealth could have demanded continuing dividends on $135,000. That is exactly what the other creditors were bound to expect under the *Merrill* case holding itself. Yet upon a simple operation occurring after insolvency and with which the other creditors had nothing to do, viz., payment by petitioner to its obligee, it is said by the Circuit Court in effect that the other creditors may have a windfall, in the form of reduction of the competing account from $135,000 to $68,588.56. Surely no "equity" can be founded upon the circumstance of a suretyship purely fortuitous as to other creditors. Such was the reasoning of the District Court below (R. 16, 17), and we find no answer to it in the opinion of the Circuit Court. The holding of the Circuit Court if settled in the law would apparently tend to encourage delay and default by the surety to the end that the secured creditor might be caused to retain his position and thus receive dividends on the date-of-insolvency basis denied to the surety. Petitioner, though in terms described by respondents before suit as subrogee of the Commonwealth's deposit claim (R. 9), becomes subrogee without right of subrogation.

The Circuit Court reached its conclusion in spite of concession that in general a surety who pays a creditor is

subrogated to the creditor's rights (R. 29), and partially upon reference to a Pennsylvania decision (R. 29) in spite of the conceded irrelevance of Pennsylvania decisions (R. 28), and upon at least a collateral suggestion that this Court might not continue to follow the *Merrill* case (R. 28), although this Court repeated the rules of that case in the recent case of *Ticonic National Bank v. Sprague*, 303 U. S. 406. The decision is contrary to that in *Fouts v. Maryland Casualty Company*, 30 F. (2d) 357 (C. C. A. 4th) wherein the court said in ruling on the dividend basis where the surety was claimant and where, as here, the surety bond had been less than the secured creditor's deposit (p. 358):

> "As only one primary debt exists, it follows that the rule of pro rata distribution, in the event of insolvency, requires that such primary debt be the basis of dividends."

The decision conflicts also with the principle stated in *American Surety Company v. DeCarle*, 25 F. (2d) 20 (C. C. A. 9th) that "Under the law, other creditors can claim no benefit from the fact that the Treasurer was secured in whole or in part . . .", because it relieves the debtor bank here of its liability to pay $135,000 on the Commonwealth deposit account, to the wholly undeserved advantage of other creditors.

The Court below (R. 31) cited as in accord with the result of its decision the cases of *Ward v. First National Bank*, etc., 76 F. (2d) 256 (C. C. A. 8th) and *Maryland Casualty Company v. Cox*, 104 F. (2d) 354 (C. C. A. 6th), and stated that the *Cox* case is directly in point. Whether such result can stand in this Court is of course the ultimate question upon the present petition, but as to the two cases cited the following ought to be noted: The *Ward* case presented a different situation, for there the surety did not pay the deposit and claim succession to the obligee's rights in it; the surety himself held the bank's assets as collateral for the bank's obligation to the surety under the surety bond.

Having sold the collateral of the bank the surety turned over the proceeds to the depositor obligee together with the difference between such proceeds and the figure of the surety bond liability. Therefore when the surety paid there was no claim on file as in the present case, and its procedure was under the indemnity in the bond and not upon succession to the obligee's proved claim as in the present case. In the *Cox* case the surety received the same dividends on its payment to the secured creditor as the other creditors on their claims, which is not the result of the decision here. Moreover, the Court in the *Cox* case conceived and was influenced by a difficulty with our position which does not exist, stating that if two or more sureties contributed to the obligee they could not all claim dividends on the whole primary debt. Obviously, as the District Court below pointed out (R. 18), the problem would be solved by pro-rating their contributions to the controlling primary debt. Moreover, both the *Cox* case and the *Ward* case were decided after petitioner's rights in the case at bar arose, so that neither those decisions nor any other existed to gainsay the petitioner's contention in the beginning for the application of the *Merrill* case principles to the present claim . . . a circumstance further showing the newly unsettled condition of the law and further suggesting the necessity for its settlement by this Court.

Finally, the very reasoning in the opinion below upon ratability is not followed to a ratable result in the Court's decision. Though the Court fixes upon the petitioner's actual payment as a basis ratable with the "actual loss" of other depositors in the sum of their deposits and *though the admitted fact is that other depositors have been paid 75% of their claims through dividend, the decision below awards petitioner only 35% of its actual payment.* This, we submit is utterly inconsistent with the ratability required by the Act. The Court below says (R. 30):

> "If the surety wants to prove for the full amount it can do so by paying promptly the amount of the obli-

gation for which it stands as surety. The amount received by the Commonwealth prior to payment by the surety did not hurt the surety because it reduced, by that much, what the surety had to pay."

No authority is cited for such observation, and we know of none in the law. Its effect, we submit, is to rule this case upon facts contrary to those presented by the record, and to remake the parties' arrangements by supposing the petitioner actually to have given credit of $125,000 to the bank prior to insolvency instead of merely having, as is the fact, undertaken a contingent liability to that limit to a depositor, with the right to expect the bank as principal to meet the primary liability. It is true that this suit was brought for the dividends following the first dividend of 40% which had previously been paid to the Commonwealth, but it was so brought because the basis of the claim was the Commonwealth deposit itself. If the basis was misconceived, and a different one is applied in the event of the suit, certainly that different one must be pursued to the ratable distribution prescribed by the Act itself. We submit that the Circuit Court has plainly failed to apply equal percentage even to the basis it substituted for that asserted, and that on that score alone the Court fell into seriously prejudicial error.

D. The Uncertain Effects of the Disregard of the Principle of Distribution by the Decision Below.

There is ample ground in the law for the proposition that a fixed and certain rule of law should be adopted as against one that allows expediency and the caprice of parties in transactions to determine results.[1] The decision of this Court in the *Merrill* case is an example of such policy as applied to the law of national bank liquidation. In the

[1] A Note on the instant case in Vol. XL Col. L. Rev., No. 8, p. 1448 (Dec. 1940) collects the decided authorities and approves the decision as lending certainty to the law.

analogous situation of cosureties, it was held in *In re Thompson*, 300 Fed. 215 (W. D. Pa.) that a paying surety is entitled to recover from an insolvent cosurety on the basis of the creditor's full claim on a theory of subrogation, because (p. 217);

> "The application of this rule makes the rights of the paying surety fixed and certain, instead of uncertain and depending on the caprice or election of the creditor to proceed first against the insolvent, or against the solvent surety, causing different results to the paying surety."

The same principle is stated in *Chemical National Bank v. Armstrong*, 59 Fed. 372, 380 (C. C. A. 4) in fixing at date of insolvency the face of claims and the stoppage of interest. The surety in *City of Oakwood v. Hartford Accident and Indemnity Company*, 51 F. (2d) 717 (C. C. A. 6th) was held entitled to insist that the secured creditor preserve the security for the surety's benefit and claim dividends on the deposit without regard to deduction for collateral.

Under the rule contended for by petitioner there is the desirable certainty in the law, the debtor bank being held to the payment of the deposit, fixed as at date of insolvency, by means of dividends or collateral sale or both. Under the contrary rule of the decision of the Circuit Court, that the surety is limited to dividends on the amount he paid the depositor, not only must sureties inevitably be forced in practice to seek as large a measure of collateral as can be withdrawn from the bank's assets but the result will be determined by creditor election. For example:

The 35% in dividends on the sum of $68,588.56 which petitioner *happens* to have paid the Commonwealth—20%, 10% and 5%—would aggregate $24,005.99. The difference between the dividends and petitioner's payment would be $44,582.57, which would be its present unrecouped loss under the decision below.

Suppose instead that petitioner had paid the full amount of the bond—$125,000—to the Commonwealth be-

fore the bank paid to the Commonwealth the first dividend of 40%, and had arranged with the Commonwealth to sell the collateral, which brought $12,411.44 in this case (R. 4, Par. 9). The deposit being $135,000, the Commonwealth would have retained $10,000 of the collateral proceeds and turned over $2,411.44 to petitioner. That would have left petitioner with $122,588.56 net loss to recover by dividends payable by the bank on $125,000. The 75% in dividends on that sum—40%, 20%, 10% and 5%—would have returned to petitioner $93,750. The salvage to petitioner from these dividends and the collateral overplus would have totalled $96,161.44. The net unrecouped loss to petitioner would have been only $28,838.56, or $15,744.01 less than in the outcome of the rule of the decision of the Circuit Court. Moreover, petitioner would go on in the future taking greater dividends to salvage that lesser balance of unrecouped loss.

The foregoing examples could be multiplied according to any supposed form of concert between the surety and the obligee. The two given show the glaring difference of result produced, on the identical date-of-insolvency facts of the present case, by different handling not involving the bank or other creditors but only the surety and its secured creditor. Surely there is no ratable certainty in a rule permitting such results. Surely no "equity" of other creditors was violated any more in the second example than in the first. We contend that a rule that can be thus managed by parties after insolvency on the same date-of-insolvency facts is unsound and of a kind that ought not to be law.

Conclusion.

On the admitted facts the District Court was correct in holding that petitioner is entitled to dividends in the bank's liquidation upon the basis of the Commonwealth's deposit until the Bank shall have paid the amount of the deposit through collateral proceeds and dividends. The Circuit Court of Appeals should be reversed on its contrary holding

and in any event on its failure to award petitioner equal percentage in dividends even on the basis it substituted. It is accordingly submitted that the petition for certiorari should be granted.

Respectfully submitted,

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